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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-8a) is reported at 499 F. 2d 774. The findings of fact and conclusions of law and the judgment of the district court (App. B, *infra*, pp. 9a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1974 (App. C, *infra*, p. 16a), and the court of appeals denied rehearing on August 21, 1974 (App. D, *infra*, p. 17a). On November 14, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 19, 1974. On December 11, 1974, the time for filing a petition was further extended by Mr. Justice Douglas to and including January 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether as a result of the 1960 amendment (74 Stat. 912) to the Suits in Admiralty Act, 46 U.S.C. 741-752, suits involving public vessels of the United States need no longer be brought under the Public Vessels Act, 46 U.S.C. 781-790, but may be brought under the Suits in Admiralty Act.

STATUTES INVOLVED

The Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741, *et seq.* provides in relevant part:

46 U.S.C. 741:

> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation,

> and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.

46 U.S.C. 742:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the

libel has been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

The Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781, *et seq.* provides in relevant part:

46 U.S.C. 781:

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. 782:

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in the case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in

Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

46 U.S.C. 785:

No suit may be brought under sections 781 to 790 of this title by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

STATEMENT

Alleging jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Public Vessels Act, 781-790, respondent, a Philippine corporation, brought suit against the United States in the district court. Respondent sought recovery for damages resulting from the sinking of its fishing vessel after a collision with the *U.S.S. Parsons*, a naval destroyer of the United States. The district court granted the United States' motion for summary judgment on the ground that the Philippine corporation was a foreign national subject to the reciprocity provision of the Public Vessels Act, 46 U.S.C. 785, and that it had not proved that the Philippine government would consent to be sued if a similar action had been brought against it by nationals of the United States (App. B, *infra*, p. 13a).

The court of appeals reversed, holding that the 1960 amendment to the Suits in Admiralty Act which, *inter alia*, eliminated the requirement in 46 U.S.C. 742 that any vessel involved in a suit under that Act be "employed as a merchant vessel", broadened the jurisdictional reach of that Act to encompass all maritime actions against the United States, including those previously cognizable only under the Public Vessels Act (App. A, *infra*, pp. 5a-8a). The court concluded that since respondent's suit was maintainable under the Suits in Admiralty Act, and since that Act has no reciprocity requirement, the district court should not have granted summary judgment to the United States (App. A, *infra*, p. 8a). In reaching this result the court of appeals acknowledged that it was allowing for the circumvention of the requirement of the Public Vessels Act "in a manner neither explicitly authorized nor perhaps contemplated by Congress" (App. A, *infra*, p. 7a).

REASONS FOR GRANTING THE WRIT

In the Public Vessels Act, 46 U.S.C. 781 *et seq.*, Congress has consented to suits against the United States for damages "caused by a public vessel of the United States" (46 U.S.C. 781). The Act provides that suits shall also be subject to the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, to the extent the provisions of the two acts are not inconsistent (46 U.S.C. 782). The Public Vessels Act, however, imposes a number of additional requirements on litigants. Thus, a foreign national cannot bring suit

unless it is established that his government "under similar circumstances, allows nationals of the United States to sue in its courts" (46 U.S.C. 785). In addition, no subpoena can be served on officers or members of the crew of a public vessel without the consent of either the Secretary of the Navy or the Commander of the vessel (46 U.S.C. 784), and in time of war, the Secretary of the Navy may obtain a stay of all proceedings brought under the Public Vessels Act (10 U.S.C. 7721-7730).

In 1960 the Suits in Admiralty Act was amended to resolve a jurisdictional conflict between district courts and the Court of Claims. Nothing in either the language or legislative history of the 1960 amendment suggests that Congress intended to affect the operation of the Public Vessels Act in any manner. The court of appeals nevertheless held in effect that the 1960 amendment to the Suits in Admiralty Act repealed the Public Vessels Act by implication.

The decision of the court of appeals is contrary to settled principles of statutory construction reflected in this Court's decisions. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341; *Preiser* v. *Rodriguez*, 411 U.S. 475. Moreover, the decision frustrates congressional intent in a manner that is potentially threatening to United States naval operations.

1. The court of appeals erroneously construed the 1960 amendment to the Suits in Admiralty Act because, we submit, it focused only on the literal wording of the amendment without considering its pur-

pose. As we shall show, there is no indication in the legislative history that Congress intended the 1960 amendment to the Suits in Admiralty Act to affect the Public Vessels Act in any manner (see pp. 16-18, *infra*), and that conclusion is confirmed by considering the amendment against the background of prior maritime legislation.[1]

Before 1916 the doctrine of sovereign immunity precluded a suit by a private owner whose vessel was damaged by the negligent operation of a vessel owned or operated by the United States. The United States could, however, sue private owners for damages to its vessels arising from the owners' negligence. Congressional attempts to deal with this inequity through the mechanism of the private bill proved cumbersome and inadequate. Accordingly, in 1916, when Congress passed the Shipping Act, 39 Stat. 728, 46 U.S.C. 801, *et seq.*, it included a provision that vessels of the old Shipping Board "while employed solely as merchant vessels" would be "subject to all laws, regulations, and liabilities governing merchant vessels" even though the United States owned or had an interest in them. 46 U.S.C. 808.

In 1920 in response to this Court's decision in *The Lake Monroe*, 250 U.S. 246, which held that the Shipping Act subjected Shipping Board vessels to

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[1] The legislative history that follows is recounted in *Johansen* v. *United States*, 343 U.S. 427, 432-434, *American Stevedores* v. *Porello*, 330 U.S. 446, 450-454, and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 218-225. See also *Amell* v. *United States*, 384 U.S. 158, 164-165.

proceedings *in rem* in admiralty, including arrest and seizure, Congress enacted the Suits in Admiralty Act which prohibits the arrest or seizure of any vessel or cargo owned by or in the possession of the United States, as well as any vessel privately owned but operated for or by the United States (46 U.S.C. 741). The Suits in Admiralty Act waived sovereign immunity, however, in that it authorized (prior to 1960) a libel *in personam* against the United States in cases involving any vessel owned by, or operated for or by, the United States, provided both that the vessel was "employed as a merchant vessel" and that such a proceeding could have been maintained had the vessel been a private vessel.[2] Although the inclusion of "public vessels" under the Suits in Admiralty Act was proposed, Congress was unwilling to extend the Act to cover non-merchant vessels owned by the United States.

In 1925 Congress passed the Public Vessels Act authorizing a libel *in personam* against the United States "for damages caused by a public vessel of the United States" and for compensation for towage and

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[2] Before 1960 the Suits in Admiralty Act, at 46 U.S.C. (1958 ed.) 742, provided in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *

salvage services rendered to such a vessel. 46 U.S.C. 781. Although the Act specified that suits which it authorized were "subject to" and would "proceed in accordance with" the provisions of the Suits in Admiralty Act "insofar as the same are not inconsistent" with the provisions of the Public Vessels Act (46 U.S.C. 782), it contained special limitations. Thus it prohibited the subpoenaing of officers or members of the crew of public vessels without the government's consent, 46 U.S.C. 784, and it barred any suit by a national of a foreign government unless he could establish that his government, in similar circumstances, would allow nationals of the United States to sue in its courts. 46 U.S.C. 785.

Although the combination of the Suits in Admiralty Act and the Public Vessels Act gave jurisdiction to the admiralty side of federal district courts in all maritime actions against the United States involving vessels, prior to 1960 such jurisdiction did not exist over non-vessel maritime contract or tort claims against the United States. Such maritime contract claims were cognizable only in the Court of Claims (or on the law side of federal district court if the claim did not exceed $10,000) under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, while such maritime tort claims were cognizable only on the law side of federal district court under the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*[3]

[3] See, *e.g.*, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4).

Prior to 1960, courts and litigants involved in maritime actions against the United States were faced with two sets of jurisdictional dichotomies: (1) vessel claims versus non-vessel claims and (2) "merchant" vessel claims versus "non-merchant" vessel claims.

In a number of factual contexts it became difficult, if not impossible, for courts to determine whether a claim was a vessel claim, cognizable on the admiralty side of federal district court, or a non-vessel claim, cognizable in the Court of Claims.[4] This con-

[4] For example, in *Eastern Steamship Lines* v. *United States*, 187 F. 2d 957 (C.A. 1), the court held that an action by the private owner of a vessel, which had been chartered by the United States for wartime use, to recover $5 million in restoration costs could not be maintained in federal district court under either the Suits in Admiralty Act or the Public Vessels Act but only in the Court of Claims under the Tucker Act. On the other hand, in *Aliotti* v. *United States*, 221 F. 2d 598 (C.A. 9), the court held on virtually the same facts that such an action was maintainable exclusively on the admiralty side of federal district court under the Public Vessels Act. This Court noticed, but had no occasion to resolve, the conflict, although it warned that "[i]t is not to be assumed that all claims sounding in contract can form the basis of a suit under the Public Vessels Act." *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 456, n. 8.

The widespread nature of the problem was reflected in the fact that on a single day in 1954 the Court of Claims dismissed six actions brought under the Tucker Act on the ground that they were cognizable only on the admiralty side of federal district court under the Suits in Admiralty or Public Vessels Acts. *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636; *Waterman Steamship Corp.* v. *United States*, 124 F. Supp. 634; *Sinclair Refining Co.* v. *United States*, 124 F. Supp. 628; *Compania Ithaca De Vapores, S.A.* v. *United States*, 124

flict created serious problems for litigants. The Court of Claims had no power to transfer actions erroneously commenced under the Tucker Act to the federal district courts, and since the Tucker Act has a six-year limitation period (28 U.S.C. 2401(a)) while the two admiralty acts have a two-year limitations period (46 U.S.C. 763, 782), litigants who misfiled in the Court of Claims often found that it was too late to file anew in federal district court. Litigants could not protect themselves by filing simultaneously in both courts because under 28 U.S.C. 1500 the Court of Claims has no jurisdiction over, and is bound to dismiss, any claim which is the subject of a pending suit against the United States in any other court. *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636 (Ct. Cl.).

Second, courts experienced difficulty determining whether a particular vessel was "employed as a merchant vessel" within the meaning of the Suits in Admiralty Act.[5] As this Court pointed out in *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 455,

F. Supp. 627; *Polar Compania De Navegacion* v. *United States*, 124 F. Supp. 625; *Lykes Bros. Steamship Co.* v. *United States*, 124 F. Supp. 622.

[5] Thus in *Calmar Steamship Corp.* v. *United States, supra*, this Court reversed the Second Circuit and held that a privately owned vessel operated for hire by the United States and engaged on a war mission was "employed as a merchant vessel," while in *Geo. W. Rogers Const. Corp.* v. *United States*, 118 F. Supp. 927 (S.D. N.Y.) the court, distinguishing *Calmar*, held that a United States Merchant Marine vessel which was carrying fuel oil for the United States Navy during peacetime was not "employed as a merchant vessel."

the consequence of holding that a vessel was not "employed as a merchant vessel" was usually insignificant where the vessel was publicly owned by the United States since "in the greater number of instances * * * the libel is dismissed under the Suits in Admiralty Act only to be heard under the Public Vessels Act in the same admiralty court." However, where the vessel was privately owned but operated by or for the United States, "to hold that she was not employed as a merchant vessel [was] to relegate the libelant, on a contract claim substantial enough not to be cognizable on the law side under the Tucker Act, 28 U.S.C. (Supp. III) § 1346, to the Court of Claims." *Ibid.* The Court found this troubling because "the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty" (*ibid.*; footnote omitted).

Congressional efforts to extricate the courts and litigants from these jurisdictional difficulties began in 1958 when the House of Representatives passed a bill amending Title 28 of the United States Code (Judiciary and Judicial Procedure) to permit the transfer of cases between the Court of Claims and federal district courts.[6] An identical bill[7] was passed

[6] The bill, H.R. 3046, 85th Cong., 2d Sess., was passed on July 21, 1958 (104 Cong. Rec. 14433-14434), but it did not emerge from the Senate Committee on the Judiciary before the expiration of the 85th Congress.

[7] H.R. 5396, 86th Cong., 1st Sess.

by the House in 1959 and considered by the Senate Committee on the Judiciary. During its deliberations the Judiciary Committee received a communication from the Secretary of Commerce, as head of the Federal Maritime Administration, criticizing the House transfer bill as inadequate and recommending direct amendment of the Suits in Admiralty Act in order to "attack the problem on a fundamental basis" and eliminate the problems arising from "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States." S. Rep. No. 1894, 86th Cong., 2d Sess. 8-11. In accordance with this recommendation, in which the Department of Justice and the Maritime Law Association concurred, the Judiciary Committee added a new section to the House bill which directly amended the Suits in Admiralty Act at 46 U.S.C. 742 in two ways. First, it provided that if an admiralty proceeding could be maintained in a given case "if a private person or property were involved," a similar admiralty proceeding could be brought against the United States. Second, it struck the proviso that if a vessel were involved it had to be "employed as a merchant vessel." This version of the House bill which was reported favorably by the Judiciary Committee became law on September 13, 1960.[8]

[8] 74 Stat. 912. The present version of 46 U.S.C. 742 provides in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. * * *

The 1960 amendment to the Suits in Admiralty Act removed the "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States" by effectively eliminating the quasi-admiralty jurisdiction of the Court of Claims. The addition of the phrase "or if a private person or property were involved" to 46 U.S.C. 742 guarantees that those non-vessel maritime contract claims previously held cognizable in the Court of Claims, as well as those non-vessel maritime tort claims previously held cognizable on the law side of federal district court, would now be cognizable on the admiralty side of federal district court.[9] Thus the dichotomy between vessel and non-vessel claims no longer exists.[10]

[9] Not all contract claims arising in a maritime context are cognizable in federal district court. In *Amell* v. *United States*, 384 U.S. 158, this Court held that wage claims (exceeding $10,000) by government employees who were seamen were cognizable exclusively in the Court of Claims under the Tucker Act and not in federal district court under the Suits in Admiralty Act.

[10] See, *e.g.*, *Roberts* v. *United States*, 498 F. 2d 520 (C.A. 9); *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 144 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 169 (C.A. 2); *T. J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.), affirmed, December 27, 1974, No. 73-1755 (C.A. 9); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1212, 1219-1220 (S.D. N.Y.); *Utzinger* v. *United States*, 246 F. Supp. 1022 (S.D. Ohio); *Tankrederiet Gefion A/S* v. *United States*, 241 F. Supp. 83, 85 (E.D. Mich.); *Tebbs* v. *Baker-Whitely*

Similarly, the elimination of the phrase "employed as a merchant vessel" from 46 U.S.C. 742 guarantees that all maritime claims involving privately owned vessels operated for or by the United States will be heard in federal district court, regardless of whether the vessels are "merchant" vessels, and none will be relegated, as this Court feared in *Calmar* (see *supra*, pp. 12-13), to the Court of Claims. No such relegation problem existed prior to 1960 with respect to claims involving publicly owned vessels of the United States since, as this Court observed in *Calmar* (see *supra*, pp. 12-13), if the district court determined that such vessels were not "merchant" vessels the claims could still be heard in the same court under the Public Vessels Act.

Although as a result of the 1960 amendment deletion of the phrase "employed as a merchant vessel," the Suits in Admiralty Act (46 U.S.C. 742) could literally be read to authorize proceedings against

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Towing Co., 227 F. Supp. 656, 657-658 (D. Md.); *Beeler* v. *United States*, 224 F. Supp. 973, 975-976 (W.D. Pa.), reversed on other grounds, 338 F. 2d 687 (C.A. 3).

The court of appeals erroneously cites (App. A, *infra*, pp. 6a-7a) the *Ira S. Bushey, T. J. Falgout Boats*, and *Richmond Marine Panama* cases as authority for the proposition that the Suits in Admiralty Act now encompasses "all maritime claims against the United States, regardless of the type of vessel involved. Those cases held merely that all *maritime tort* claims previously cognizable against the United States under the Federal Tort Claims Act are now encompassed by the Suits in Admiralty Act as a result of the addition of the phrase "or if a private person or property were involved." None of these cases suggests that the Suits in Admiralty Act now encompasses claims cognizable under the Public Vessels Act.

"public vessels," the history of the amendment demonstrates that Congress did not intend to repeal the Public Vessels Act. As shown above, the 1960 amendment was designed solely to cure a jurisdictional problem arising from the quasi-admiralty jurisdiction of the Court of Claims—a problem which never existed in suits under Public Vessels Act since such suits were always cognizable in district courts.

2. Notwithstanding its recognition that repeal of the Public Vessels Act was "neither explicitly authorized nor perhaps contemplated by Congress" (App. A, *infra*, p. 7a), the court of appeals held, in effect, that the 1960 amendment to the Suits in Admiralty Act repealed the Public Vessels Act by implication. But it is well settled that repeal by implication is not favored, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, especially where, as here, the purposes of the 1960 amendment was wholly unrelated to the policies of the Public Vessels Act.

The fact that the 1960 amendment can be literally read to encompass suits involving public vessels does not justify repeal of the Public Vessels Act by implication. Congress recognized that the provisions of the Public Vessels Act and the Suits in Admiralty Act are not entirely consistent (46 U.S.C. 782) and we submit that suits involving public vessels must satisfy the specific requirements of the Public Vessels Act.

This conclusion is based on the principle, reflected in this Court's decisions, that "[s]pecific terms pre-

vail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208; *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107. This principle applies even if the general terms became effective, as here, subsequent to the specific terms. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758. Thus in *Preiser* v. *Rodriguez*, 411 U.S. 475, 489, this Court held that the specific terms of the federal habeas corpus statute (28 U.S.C. 2254) provided the exclusive remedy for state prisoners attacking the validity of the fact or length of their confinement "despite the literal applicability" of the broad general language of 42 U.S.C. 1983. The Court ruled that since the habeas corpus statute was "explicitly and historically designed" to cover the situation, its terms "must override the general terms of § 1983." 411 U.S. at 489, 490. The Public Vessels Act was "explicitly and historically designed" to cover claims, such as the instant one, involving publicly owned vessels of the United States, and suits presenting such claims must satisfy the requirements of the specific terms of the Public Vessels Act, even if they come within the literal terms of the Suits in Admiralty Act.

Respondent's suit, involving a claim of damages caused by a Navy destroyer, is covered by the Public Vessels Act, and the court of appeals erred in reversing the district court's judgment that respondent's failure to satisfy the reciprocity requirement of that Act was fatal to its claim.

3. Although this case involves only the reciprocity requirement of the Public Vessels Act, the decision of the court of appeals effectively repeals the Public Vessels Act in its entirety because the court held that suits involving public vessels need not be brought under the Public Vessels Act. Thus, the decision, if permitted to stand, will nullify several important congressional policies concerning suits involving public vessels.

For example, under 46 U.S.C. 784, officers and members of the crew of any publicly owned vessel of the United States may not be subpoenaed in connection with any suit authorized under the Public Vessels Act without the consent of the Secretary of the department or the person in control of the vessel at the time of the issuance of the subpoena. No such protection exists in suits authorized under the Suits in Admiralty Act.

More importantly, pursuant to 10 U.S.C. 7721-7730, the Secretary of the Navy, during time of war, may obtain a stay of any suit or proceedings brought under the Public Vessels Act when it appears that prosecution of the suit might interfere with naval operations. No such protection is available for suits brought under the Suits in Admiralty Act. The decision of the court of appeals nullifies the protection afforded by 10 U.S.C. 7721-7730 with potentially serious implications for the security of naval operations.[11]

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[11] The financial and administrative implications of the decision of the court of appeals are also substantial. The Suits in Admiralty Act permits interest on judgments to accrue

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.[12]

Respectfully submitted.

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CARLA A. HILLS,
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Attorneys.

JANUARY 1975.

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from the time suit is filed. 46 U.S.C. 745. The Public Vessels Act, on the other hand, does not allow interest to accrue prior to the time of judgment. If the suit here proceeded under the Suits in Admiralty Act and respondent prevailed, the difference in the interest award would be in the neighborhood of $250,000. The prospect of prejudgment interest in all admiralty judgments against the United States involving publicly owned vessels has a decided fiscal impact. Moreover, litigants aware of this difference would be disinclined to make use of the voluntary settlement provisions permitted under 10 U.S.C. 7622 and would instead file their suits as rapidly as possible.

In addition, the special venue requirements, 46 U.S.C. 782, of the Public Vessels Act would be nullified if the decision were permitted to stand.

[12] We believe the error committed by the court of appeals to be so plain that this Court may wish to grant the petition and summarily reverse the judgment of the court of appeals.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1189

[Filed June 24, 1974, , Clerk,
U. S. Court of Appeals]

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

No. 73-2417

JOHN A. KROH, SR., EDWARD L. WINN, SR., ALLEN T. PERRY, ROBERT E. G UNN, CORNELIUS ROACH, HERMAN SUTHERLAND, individuals, and H. O. PEET & CO., *Inc.*, a corporation, and STEPHEN, INC., a corporation, and UNITED CONTINENTAL TUNA CORPORATION, a corporation, PLAINTIFFS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES.

Appeal from the United States District Court
from the Central District of California

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges

TRASK, Circuit Judge:

This case requires us to consider the interrelationship of the 1960 amendments to the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, as amended, September 13, 1960. Pub. L. 86-770, § 3, 74 Stat. 912; the Public Vessels Act, 46 U.S.C. §§ 781-790, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* It arises in the context of two suits brought by the owners of a fishing vessel who allege that the boat's sinking was caused by the U.S.S. Parsons, a naval destroyer and public vessel of the United States.

In late 1969, United Continental Tuna Corporation (Tuna Corporation) with funds furnished by American investors purchased a fishing vessel, the M.V. Orient and refitted it at considerable expense. Tuna Corporation was organized as a Philippine corporation to enable the boat to operate in the Republic of the Philippines. On its first voyage it was overhauled and hailed 70 miles outbound from San Pedro by the U.S.S. Parsons; a collision followed which resulted in the sinking of the Orient with total loss. The corporation filed an action in District Court against the United States to recover its loss under both the Suits in Admiralty to recover its loss under Public Vessels Act (PVA). The District Court granted the United States' motion for summary judgment and this appeal followed. During the pendency of that action the corporation was dissolved and its rights to recover for the loss of its sole asset were distributed to its shareholders. The shareholders com-

menced an alternative or back-up action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (FTCA) alleging in substance that if they had no remedy for their cause of action under either SIA or PVA they had a remedy under FTCA. The two appeals were consolidated for argument and will be considered together here.

The basis upon which the motion for summary judgment was granted in the first action was that the appellant was a "foreign national" and therefore subject to section 5, the reciprocity provision of the PVA, 46 U.S.C. § 785.[1] That is, because the appellant was incorporated under the laws of the Republic of the Philippines, the court ruled that the appellant had to demonstrate that the Philippine government would consent to be sued if an action were brought against it by a United States citizen under like circumstances. Relatedly, the court concluded that the individual shareholders of Tuna Corporation had no greater rights derivatively than the corporation had originally. Since the appellant failed to demonstrate reciprocity, the court dismissed the suit on jurisdictional grounds. In so doing, the court implicitly rejected the argument that the appellant could maintain its action under the SIA *alone*, without reference to the PVA, and thereby avoid the application of the reciprocity requirement.

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[1] "785. Suits by nationals of foreign governments

"No suits may be brought under sections 781-790 of this title by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its court."

Prior to 1920, the United States claimed complete sovereign immunity from all claims arising out of collisions with its vessels. The first inroad upon this absolute immunity came in 1920 with the enactment of the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. Section 742 of the SIA provided:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant vessel* . . . ." (Emphasis supplied)

Thus, the government waived its immunity from liability for damages, but only in instances where United States "merchant" vessels or cargo were involved.

The second expansion occurred in 1925 with the passage of the Public Vessels Act. 46 U.S.C. §§ 781-790. This Act further waived sovereign immunity by permitting actions against the United States involving public vessels. It was in the PVA, however, that the reciprocity limitation previously discussed [2] was introduced. No such requirement was contained in the earlier SIA. There were other differences between the two admiralty statutes as originally enacted, including dissimilar venue provisions [3] and prejudgment interest allowances.[4] However, over the years, the courts have consistently construed the two maritime statutes together as constituting a complementary plan for the recovery of damages caused by government-owned vessels. Thus in *Calmar SS Corp.* v. *United States*, 345 U.S. 446, 451 (1953), the Supreme Court interpreted the two acts as "manifestations of a single larger purpose, jointly forming a rational system free of random omissions and exceptions." *See also Aliotti* v. *United States*, 221 F.2d 598, 602 (9th Cir. 1955); *Mejia* v. *United States*, 152 F.2d 686, 687 (5th Cir. 1945).

[2] See note 1 *supra*.

In 1960, however, this statutory scheme was disrupted by the adoption of an amendment to section 742 of the Suits in Admiralty Act. The amendment deleted the jurisdictional language in the first sentence of section 742 which had limited that Act to suits involving United States *merchant* vessels. In its place, a broad, new jurisdictional statement was substituted:

> "In cases where if such vessel were privately owned or operated, or if such cargo were private-

[3] Under the SIA, venue lies only in the District Court for the district in which the plaintiff resides or has his principal place of business, or in which the vessel or cargo charged with liability can be found. 46 U.S.C. § 742. The PVA, however, authorizes suit in any district court of the United States if the plaintiff neither resides nor has a principal place of business in the United States and the United States vessel is outside United States territorial waters. 46 U.S.C. § 782.

[4] See Richmond Marine Panama, S.A. v. United States, 350 F. Supp. 1210, 1219-21 (S.D.N.Y. 1972).

> ly owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . ."

No mention of the PVA reciprocity provision appears in either amended section 742 or its legislative history. Indeed, the legislative history rather reveals that this amendment emerged as a hasty afterthought in a remedial effort that was primarily directed at eliminating the jurisdictional confusion between the admiralty statutes and the Tucker Act.[5] There is only the unelaborated observation that: "A substantial portion of the jurisdictional uncertainty in this area is attributable to confusion in establishing whether a vessel is a 'merchant vessel' or a "public vessel.' ". S.Rep. No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3586.

Notwithstanding the many ambiguities inherent in this legislative action, the majority of courts considering the 1960 amendments have interpreted the SIA as presently encompassing all maritime claims against the United States, regardless of the type of vessel involved. *See e.g. Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167, 169 (2d Cir. 1968);

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[5] Both the SIA and the PVA contain a 2-year statute of limitations, while the Tucker Act (authorizing suit in the Court of Claims) has a 6-year limitations period. A mistake in selecting the correct statute and court frequently resulted in the loss of all relief. It was this fact which primarily motivated the legislative action which resulted in the 1960 amendments.

T. J. Falgout Boats, Inc. v. *United States*, 361 F. Supp. 838, 841-42 (C.D. Cal. 1972); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1219-21 (S.D.N.Y. 1972); *but see J. W. Peterson Coal & Oil Co.* v. *United States*, 323 F. Supp. 1198 (N.D. Ill. 1970). Relatedly, in *Amell* v. *United States*, 384 U.S. 158, 164 (1966), the Supreme Court observed:

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act . . . . Simultaneously, Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys and had caused misfilings in the past . . . ."

Since the favored literal reading of amended section 742 would certainly support maintenance of the appellant's suit under SIA, we believe that the District Court erred when it dismissed the action as predicated upon that Act. Moreover, since section 785 of the PVA explicitly restricts the operation of the reciprocity requirement to that act alone, we see no reason to import the restriction to the SIA. *Cf. De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 145-146 (5th Cir. 1971). We acknowledge the government's concern that such a conclusion permits the PVA reciprocity provision to be circumvented in a manner neither explicitly authorized nor perhaps contemplated by Congress. However, we note that the more stringent venue requirements of the

SIA [6] may prohibit some foreign nationals from proceeding under the Act, and thus leave the PVA and its reciprocity clause some continuing efficacy.

Finally, we note that our conclusion here is consonant with the modern view which liberally construes waivers of governmental immunity. As Judge Brown observed in *Gulf Oil Corp.* v. *Panama Canal Co.*, 407 F.2d 24, 28 (5th Cir. 1969):

> "In the structure of the Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq., the Public Vessels Act, 46 U.S.C.A. § 781 et seq., and the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b) which expose the government in all of its sovereign glory to almost unlimited liabilities comparable to private parties, the approach is to construe the waiver sensibly, naturally, which means most of the time literally."

Since we conclude that the appellant's action is maintainable under the SIA, the necessary corollary is that this action is not cognizable under the FTCA. 28 U.S.C.A. § 2680(d).

We therefore reverse and remand the first action (Appeal No. 72-1189) for a trial on the merits, and affirm the dismissal of the appellant's second action (Appeal No. 73-2417).

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[6] See note 3 *supra*.

APPENDIX B

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[Filed Oct. 18, 1971, Clerk, U. S. District Court, Central District of California, by R.T., Deputy, Entered Oct. 19, 1971, Clerk, U. S. District Court, Central District of California]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Defendant's Motion for Summary Judgment having come on for hearing on August 16 and October 4, 1971, and the Court having heard argument and reviewed the briefs and being fully advised in the premises and a decision having been duly rendered granting Defendant's Motion for Summary Judgment,

IT IS ORDERED AND ADJUDGED that Plaintiff's Complaint be and the same hereby is dismissed with prejudice, each party to bear its own costs.

DATED: Oct. 18, 1971

/s/ Albert Lee Stephens, Jr.
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, United Continental Tuna Corporation, is a Philippine corporation and at all times material was the owner and operator of the fishing vessel M/V ORIENT.

2. Defendant United States of America, through its agency, Department of the Navy, was, at all times material, the owner and operator of the USS PARSONS (DDG-33), a public vessel of the United States.

3. Plaintiff, United Continental Tuna Corporation, brings this action against the United States alleging damages incurred as a result of a collision on December 11, 1969 between the M/V ORIENT and the USS PARSONS.

4. Plaintiff alleges jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Public Vessels Act, 46 U.S.C. 781-790.

5. In answering Plaintiff's Complaint and in its Motion for Summary Judgment, the United States alleges as an affirmative defense that this Court lacks jurisdiction of the cause in that Philippine law fails to meet the reciprocity requirements of Section 5 of the Public Vessels Act, 46 U.S.C. 785.

6. Plaintiff, United Continental Tuna Corporation, in an attempt to defeat the reciprocity requirements of the Public Vessels Act, alleges that said corporation has now been dissolved under Philippine law and that the shareholders of said corporation, over 99% of whom are alleged to be citizens of the

United States, should be substituted into this action, in place of United Continental Tuna Corporation, as the "real parties in interest".

CONCLUSIONS OF LAW

1. The Court's jurisdiction over Plaintiff's claim against Defendant, United States of America, is pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. 741-752 and the Public Vessels Act, 46 U.S.C. 781-790.

2. Plaintiff's claim is subject to the reciprocity requirements of Section 5 of the Public Vessels Act, 46 U.S.C. 785. In order to meet the requirements of this section, Plaintiff has the burden of proving to this Court that the Philippine Government has consented to be sued in its courts by United States citizens "under similar circumstances," *i.e.*, on a cause of action arising from a collision between a Philippine public vessel and a vessel owned by a citizen of the United States.

3. The Philippine Government has not waived its sovereign immunity from suit for damages arising from collisions involving public vessels of the Philippine Government. *Luzon Stevedoring Corp.* v. *United States*, 1970 A.M.C. 1991 (D.C. 1970). (Not otherwise reported.) Philippine law accordingly does not meet the reciprocity requirements of the Public Vessels Act and the Court lacks jurisdiction of this cause pursuant to 46 U.S.C. 785.

4. Even if, as Plaintiff alleges, Plaintiff United Continental Tuna Corporation has been dissolved and its assets transferred to its shareholders, and further assuming that over 99% of said shareholders are citizens of the United States, Defendant's defense of lack of reciprocity under the Public Vessels Act would not be affected. Under such circumstances, if proven, all that would have been transferred to the aforementioned shareholders would have been the Plaintiff corporation's cause of action against the United States and the shareholders would have no greater rights in enforcing the corporate cause of

action than the corporation itself. Plaintiff's Complaint must accordingly be dismissed.

DATED: Oct. 18, 1971

/s/ Albert Lee Stephens, Jr.
United States District Judge

PRESENTED BY:

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FREDERICK M. BROSIO, JR.
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/s/ Clarke A. Knicely
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APPENDIX C

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 72-1189 UNITED CONTINENTAL TUNA CORPORATION *vs.* USA

73-2417 JOHN A. KROH, SR. ETC ET AL *vs.* USA

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-24-74 reversing and remanding appeal No. 72-1189 affirming etc appeal No. 73-2417 the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U. S. Court of Appeals

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1189

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE
Before: KOELSCH, HUFSTEDLER and TRASK

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

[Filed Aug. 21, 1974, Clerk, U. S. Court of Appeals]

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